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Supreme Court, U.S.
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No. 97-471

In The

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., A Law Partnership, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DREISESZUN, OZAR AND THE ESTATE OF FRANK S. MORGAN

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QUESTIONS PRESENTED

1. Where federal choice-of-law issues under familiar *Erie* principles have been finally adjudicated in a prior appeal, establishing the proper limitations analysis, should the federal appellate court in a subsequent appeal delay its decision for federalism concerns until a state court determines a limitations question in unrelated litigation that cannot affect the outcome of the case?

2. Is the GVR procedure appropriate where the federal appellate court was aware of the state court decision, where a remand would require application of a different state's limitations laws rather than those interpreted by the state court, and where reconsideration on remand would not affect the outcome but would play into a larger, manipulative litigation strategy which the petitioner is admittedly trying to pursue?

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System ("KPERS"), the plaintiff and appellant below.

Respondents on this brief are: Thomas S. and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; Sherman Dreiseszun; and I.I. Ozar, all defendants and appellees below.

Other respondents are: KPMG Peat Marwick and Robert Spence; Shook, Hardy & Bacon, P.C., Shook, Hardy & Bacon, and Frank Sebree; Blackwell Sanders Matheny Weary & Lombardi, L.C.; and Reimer & Koger Associates, Inc. and certain of its former employees (Ken Koger, Ron Reimer, Clifford Shinski, Brent Messick and Robert Crew).

In addition, the Resolution Trust Corporation ("RTC") was a party to this case.

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BRIEF IN OPPOSITION OF RESPONDENTS DREISESZUN, OZAR AND THE ESTATE OF FRANK S. MORGAN

Respondents Dreiseszun, Ozar and the Estate of Frank S. Morgan respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's most recent decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 114 F.3d 697 (8th Cir. 1997) (*"KPERS VI"*), and is included in the Appendix to the Petition at App. 1a-23a.[1] The order of the court of appeals denying rehearing is included in the Appendix to the Petition at App. 24a. The order of the court of appeals denying KPERS' second petition for rehearing out of time or alternative motion to recall the mandate is included in the Appendix to this Brief at R. App. 1. The district court decisions granting summary judgment on statute of limitations grounds are unreported and are included in the Appendix to the Petition at App. 27a-100a. Previous opinions of the court of appeals in this case are reported: *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994) (*"KPERS I"*); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) (*"KPERS II"*); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608

[1] References to the Appendix to the Petition are "App. ___a." References to the Appendix to this brief in opposition are "R. App. ___."

(8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996) (*"KPERS III"*); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.), *cert. denied*, 117 S. Ct. 359 (1996) (*"KPERS IV"*); *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) (*"KPERS V"*).

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1997. Rehearing was denied on June 12, 1997. The court of appeals' order denying KPERS' second petition for rehearing out of time, or alternative motion to recall the mandate based on a state court decision in unrelated litigation, was entered on September 9, 1997. R. App. 1. The Petition was filed on September 10, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 12 U.S.C. § 1441a(*l*).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Mo. Rev. Stat. § 516.190 (the "borrowing statute"):

> Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

12 U.S.C. § 1441(a)(*l*)(1):

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust] Corporation is a

party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding.

STATEMENT OF THE CASE

A. Factual and Procedural Background

This case has been extensively litigated for several years in the district court and court of appeals, resulting in multiple reported opinions. The court of appeals' most recent opinion in *KPERS VI*, for which review is now being sought, App. 1a-23a, accurately recounts the factual and procedural background of this federal litigation. Accordingly, this statement of the case provides only a brief overview of the extent to which the courts below have studied this case, and the extraordinary time the federal judiciary has devoted to KPERS' investment-based claims over the last five years.

KPERS invested in 1986 in high yield, high risk subordinated debentures issued by Home Savings Association of Kansas City, N.A. ("HSA"). Respondents Morgan, Dreiseszun and Ozar (the "Home Savings defendants") were directors of HSA.[2] KPERS' investment in these HSA debt securities was part of a program undertaken by KPERS to place a small portion of its portfolio in local but higher risk offerings. Many of these risky investments of the 1980's paid handsome returns, but others have

[2] Frank Morgan died in October 1993, and his estate was substituted as defendant in the case.

evolved into lawsuits seeking recovery of investment losses brought by KPERS in the 1990's.

The events and facts upon which KPERS' various investment claims in this case are based – HSA's failure to acquire a St. Louis thrift, HSA's regulatory compliance, and KPERS chairman Michael Russell's dealings with HSA and affiliate banks – were known to the KPERS board and its many advisors beginning in early 1986 and continuing in the ensuing years. Rather than take any action, KPERS deliberately chose to wait and see how the HSA investment would play out, and collected about 45% of its principal from HSA's interest payments on the debentures. HSA was placed in receivership under control of the Resolution Trust Corporation in 1991, and the RTC declared the KPERS' investment worthless.

In the wake of the HSA receivership, and following a highly critical legislative inquiry into KPERS' investment practices, KPERS retained private, contingent fee counsel and filed a series of lawsuits in the Kansas state court. The Home Savings defendants were added to this case in December 1991, more than five years after KPERS was on notice of the facts on which its claims were based. The HSA case was unique, in that the HSA investment was KPERS' only foray into the field of a federally insured institution, bringing into play the role and federal statutory rights of the RTC as HSA's receiver and the new obligor on the securities purchased by KPERS. This case is the only one to which the three Home Savings defendants were parties. After the RTC was joined as a party in this case, it removed the entire case to the Western District of Missouri, pursuant to 12 U.S.C. § 1441a(*l*). From that point in the litigation through today, the case was, in the

language of the federal jurisdictional statute, "deemed to arise under the laws of the United States." KPERS' motion to remand was denied, and the court of appeals affirmed in *KPERS I*. 4 F.3d at 614. The current line-up of the parties was established in *KPERS II*. 60 F.3d at 1304.[3]

The court of appeals' decision in *KPERS III*, 61 F.3d at 608, set the stage for the dismissal of the case as untimely which led to the current petition for a writ of certiorari. Applying familiar federal choice of law principles, the court of appeals held that the district court should apply the limitations law of the forum state, Missouri, which included the "borrowing statute," Mo. Rev. Stat. § 516.190, and held on state law grounds that a new Kansas ten year limitations statute, Kan. Stat. Ann. § 60-522, did not purport to revive barred claims. *KPERS III*, 61 F.3d at 615. For its own strategic reasons, KPERS did not contest in *KPERS III* the earlier district court ruling that KPERS was subject to statutes of limitations because its investment activities were conducted in a proprietary capacity nor did KPERS seek a certification of that issue to the state court. Under the choice of law analysis established in *KPERS III*, the district court was directed on remand to determine whether KPERS' various claims were barred under the Kansas two and three year statutes of limitation, Kan. Stat. Ann. §§ 60-513(a) and 60-512. *KPERS III*, 61 F.3d at 614-16. KPERS sought in a petition for rehearing to have the applicability of the new Kansas ten year statute certified to the state court,

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[3] In the meantime, the Eighth Circuit reviewed KPERS' claims against the trustee of the HSA debentures. *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995).

but did not ask this Court to review the denial of certification in the subsequent petition for a writ of certiorari. Nor did KPERS seek certification of the question of its alleged immunity from limitations defenses, the issue KPERS now argues should have been certified in the current appeal.

Faced with virtual certainty that this case would be found untimely under the *KPERS III* decision, KPERS embarked on a series of abusive tactics intended to delay dismissal while it set up the limitations question in the other state court cases it had filed (which involved other investments and to which the Home Savings defendants were not parties), trying to create a federal court/state court conflict. These other cases remained and still pend in the Kansas courts because of the absence of any federal issue, like the RTC's involvement in this case. One of KPERS' gambits was to sue some of the defendants in this case in new state court cases, which led to the preliminary injunction affirmed by the court of appeals in *KPERS IV*, 77 F.3d at 1063.[4] Another move was KPERS' attempt to disqualify the district judge, which the court of appeals rejected in *KPERS V*, 85 F.3d at 1353 (describing KPERS' many abusive and dilatory litigation tactics).

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[4] KPERS has not sought review in the current petition of the court of appeals' permanent injunction. App. at 23a. In *KPERS IV*, the court of appeals carefully considered and rejected KPERS' argument for "*Burford* abstention," 77 F.3d at 1071, an argument KPERS does not rely on in its current Petition.

B. The District Court and Court of Appeals' Decisions

KPERS' delay tactics in this federal litigation allowed it to push the statute of limitations issue forward in the other, unrelated state court cases it had filed over other investments. Under the *KPERS III* mandate, however, there was no reason in this case to await developments in the unrelated Kansas cases because the limitations issue in this case was controlled by the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, under federal choice-of-law principles. *KPERS III*, 61 F.3d at 611-14. Accordingly, with all fact discovery completed, the district court conducted a series of hearings over three days on the defendants' motions for summary judgment.

The district court held that KPERS and its board of trustees (as well as its agents) were on actual notice of facts that triggered the running of the limitations on its claims against the three Home Savings defendants as early as December 1986. App. 36a-44a, 64a-65a. It therefore followed that all of the claims asserted by KPERS against the Home Savings defendants in December 1991 were barred under the Kansas limitations statutes, thus providing a complete defense under the Missouri borrowing statute, Mo. Rev. Stat. § 516.190. App. 65a-68a.[5]

The court of appeals affirmed in its seventh unanimous opinion in this litigation. It correctly viewed the

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[5] The district court also held "for the third time" that KPERS was performing a proprietary function when it invested in the HSA subordinated debentures, and thus that KPERS was subject to limitations defenses in litigation relating to that investment. App. 54a.

prior *KPERS III* decision as the established limitations rule, and determined that KPERS presented no compelling reason to revisit the law of the case, or to certify questions already ruled in *KPERS III* to the state court for a new look. App. 12a-15a and note 11. The court of appeals noted that the record was clear that KPERS itself was on actual notice of facts sufficient to trigger a limitations period in October-November 1986, App. 4a-6a, 16a-17a, more than five years before the Home Savings defendants were sued in December 1991, and that in any event notice to KPERS was beyond any fair question by September 1988, App. 18a and note 13, making the case untimely under the two and three year limitations periods established through the federal choice-of-law analysis in *KPERS III*. Accordingly, the summary judgment for all defendants was affirmed, and both of KPERS' petitions for rehearing were denied.

C. The Subsequent Kansas Supreme Court Decision

On June 27, 1997 the Kansas Supreme Court issued its decision in *KPERS v. Reimer & Koger Assocs., Inc., et al.*, 941 P.2d 1321 (Kan. 1997), 1996 WL 374595, involving combined interlocutory appeals in state court cases involving other KPERS investments in companies with no federally-insured deposits, unlike HSA. The three Home Savings defendants were not parties in any of the various other KPERS lawsuits that were involved in the Kansas Supreme Court decision. In a lengthy opinion, the state court ultimately held that KPERS is subject to statutes of limitations from and after the enactment of Kan. Stat. Ann. § 60-522 (the ten year, special KPERS statute) in

1992. 1997 WL 374595 * 30. The court disagreed with the Eighth Circuit's decision in *KPERS III* that the special ten year statute did not revive barred claims. *Id.* at * 31. The recent state court decision, the court of appeals' *KPERS III* decision, and the court of appeals' current decision in *KPERS VI*, are consistent on the one point relevant here – KPERS is subject to limitations defenses in all of its investment-related litigation, including this case.

REASONS FOR DENYING THE WRIT

1.a. This case is highly unusual in that the court of appeals has reviewed the case seven times over five years. It is and was intimately familiar with all of the KPERS litigation, both the federal Home Savings case that came to it via the RTC and its removal statute, 12 U.S.C. § 1441a(*l*), and the various other Kansas state court cases that KPERS continues to pursue. The court of appeals was provided with a copy of the Kansas Supreme Court's recent opinion in connection with KPERS' second petition for rehearing, and thus had an opportunity to consider the state court pronouncements against the backdrop of five years of federal court proceedings chronicled in *KPERS I* through *KPERS VI*. No reasonable expectations were unsettled, and no inappropriate federal encroachment on state law occurred, from the result in this case because it was driven by the federal removal statute, which in turn was triggered by KPERS' own decision to invest in a federally-insured savings and loan association located in Missouri. That the court of appeals has devoted extensive resources to this case over the years suggests strongly that review by this Court at this time is

unnecessary and unwarranted based on the questions presented.

KPERS is a disappointed litigant, and each of its complaints with the court of appeals' *KPERS VI* decision really reflects no more than disagreement with the outcome. This is not a "federalism case" because this case came to the federal courts in Missouri through the RTC removal statute, bringing into play federal choice-of-law rules for limitations issues, *see Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 158-60 (1983), and these federal rules would necessarily differ from cases that remained in the Kansas state courts where the RTC was not a party. The *KPERS VI* decision, for which review is now sought, was foreordained by the *KPERS III* decision which established the limitations law of the case without implicating any federalism concerns. Indeed, it is not at all unusual for federal courts to apply the limitations law of the forum state in cases where another state's substantive law may govern the merits, *see, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Wells v. Simmonds Abrasive Co.*, 345 U.S. 514 (1953); *Cope v. Anderson*, 331 U.S. 461 (1947), and that is all that happened here. *KPERS III*, 61 F.3d at 611 (citing *Cope*). *Cf. DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 512 (1994). KPERS' professed concerns for federalism are really only its way of arguing that it believes the Eighth Circuit erred, and that is not a good reason for this Court to review a procedurally unique case that the court of appeals has reviewed seven times already.

b. Certification of questions of Kansas law to the Kansas Supreme Court was not required or even appropriate in this case because the *KPERS III* decision set the stage for all that was to follow. KPERS' attempt to dress up the case in federalism terms is not persuasive. The federal choice-of-law analysis under the *Erie* doctrine in *KPERS III*, 61 F.3d at 611-612, resulted in the law of this case that KPERS is subject to limitations defenses and that the forum state's limitations law controls. *Id.* at 614. In the later *KPERS VI* appeal, there was nothing to certify to the state court that could have altered that part of the prior *KPERS III* decision. The Kansas certification statute, Kan. Stat. Ann. § 60-3201, allows state court review only for questions that "may be determinative of the cause," which was plainly not the case here in view of *KPERS III*.

The recent Kansas Supreme Court decision is consistent with *KPERS III* in holding that KPERS is subject to limitations defenses; the two courts part company only in their view of whether the new Kansas ten year statute of limitations operates to revive KPERS' barred claims. *KPERS III* held that the special ten year statute of limitations did not apply in this case because it did not revive barred claims. 61 F.3d at 615-616. In the *KPERS VI* appeal, it would have been inappropriate for the court of appeals to presume that the Kansas court would reach a different conclusion from *KPERS III*, and thus the court of appeals properly declined to certify this issue, especially since it had declined this same invitation during the rehearing process in *KPERS III*.[6] Moreover, in *KPERS VI*, and as

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[6] Certification of this question in *KPERS III* would not have been appropriate under Kan. Stat. Ann. § 60-3201 because the

argued in the Petition, KPERS was seeking certification of the question of whether it is subject to any limitations defense, App. 14a-15a, n.11, an irrelevant question in view of the 1992 enactment of the special ten year statute for KPERS. If either aspect of the Kansas limitations law had been certified to the state court, or if the state court had gotten its decision out before the opinion in *KPERS VI*, then the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, would not apply and the district court's summary judgment would have been analyzed under the Missouri five year statute of limitations to the same end – KPERS' 1991 claims were time barred by its notice in 1986. Because the result is the same under either state's limitations law, certification would have been a wasted effort. Besides, the court of appeals had the opportunity to consider the Kansas court's views in connection with KPERS' second petition for rehearing. R. App. 1.

c. Certification of state law questions should never be mandatory. As in the abstention area, courts must have the ability to analyze and react to different fact situations and procedural contexts in order to make an informed discretionary judgment on whether to certify a question to the state courts. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). This case presents a good example of why the mandatory "certification or stay" rule for which KPERS seeks the Court's review would be a bad rule. The case

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statute is invoked only for "determinative" questions, which was not the case, and questions for which there is "no controlling precedent." The Eighth Circuit's decision on this issue in *KPERS III*, in contrast, was guided by *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992).

was in a unique procedural posture in view of the RTC's invocation of its interstate removal rights under 12 U.S.C. § 1441a(*l*), a situation unlikely to occur often, especially since the RTC no longer exists. The case had already been the subject of extensive federal appellate review. The claims asserted by KPERS were untimely under the Missouri five year statute of limitations, and under the two and three year Kansas statutes identified in *KPERS III*. The only way that KPERS' claims could have survived in *KPERS VI* would have been a reversal of the federal law holding in *KPERS III*, a result that "certification or stay" could not achieve. Moreover, this is not a case within the *Pullman* abstention doctrine, because the Eighth Circuit was not being asked in *KPERS VI* to invalidate any state law. *Cf. Arizonans For Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1073 (1997). Indeed, in *KPERS III*, the court of appeals interpreted the controlling Kansas precedent so as to avoid the "troublesome" constitutional questions asserted by the Home Savings defendants. *KPERS III*, 61 F.3d at 616. In short, the court of appeals made a reasoned and correct discretionary decision not to certify an irrelevant question to the Kansas court. A rule that would strip the courts of appeals of their ability to exercise an informed discretion in these situations would not promote federalism, but rather would simply delay and increase the costs for the administration of justice in the federal courts.

2.a. This Court's grant, vacate and remand procedure ("GVR") is not appropriate in this case because: (a) the court of appeals had an opportunity to consider the state court decision; (b) remand would result in the application of Missouri law, rather than the intervening

rule announced by the Kansas court, and the outcome of the case would not change; (c) there was no error in the judgment reached by the court of appeals in *KPERS VI*, in view of the prior *KPERS III* decision; and (d) KPERS is trying to manipulate the GVR procedure in order to set up a whole new round of wasteful and needless litigation over its Home Savings investment.

The process for determining whether to invoke the GVR process is set forth in *Lawrence v. Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996):

> Where intervening developments, or recent developments that *we have reason to believe the court below did not fully consider*, reveal a reasonable probability that the decision below rests upon a *premise that the lower court would reject if given the opportunity* for further consideration, and where it appears that such *a redetermination may determine the ultimate outcome of the litigation*, a GVR order is, we believe, *potentially appropriate*. Whether a GVR order is *ultimately appropriate* depends further on the equities of the case: *if it appears that the intervening development*, such as a confession of error in some but not all aspects of the decision below, *is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court*, a GVR order is inappropriate.

116 S. Ct. at 607 (emphasis added). In this case, the threshold test on whether the GVR procedure is "potentially appropriate" is not met, and the "equities of the

case" compel the conclusion that the court of appeals' decision should not be disturbed.[7]

b. This is not a case where the Kansas court disapproved of prior decisions on which the Eighth Circuit relied in *KPERS VI*. Indeed, on the question of whether the new Kansas ten year statute revived barred claims – the issue resolved in this case in *KPERS III* – both courts relied on the language of the statute, with the Eighth Circuit applying the rule of *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992), *see KPERS III*, 61 F.3d at 614-616, and the Kansas court refusing to "enter into a discussion of the application of *Harding*," *see KPERS*, 1997 WL 374595 at *31.[8] In *KPERS VI*, the case for which review is now sought, there really is no inconsistency between the courts other than the state court's disagreement with the result in *KPERS III*. Moreover, as demonstrated in Part 1.b., a remand of this case would not change the result because the court of appeals would apply the Missouri five year statute of limitations, as

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[7] This case is not like *Huddleston v. Dwyer*, 322 U.S. 232 (1944), relied on by KPERS in the Petition at 10-11, 19, because in that case this Court had already granted the petition for a writ of certiorari. *See Stutson v. United States*, ___ U.S. ___, 116 S. Ct. 611 (1996) (Rehnquist, C.J., concurring). Accordingly, *Lawrence* provides the controlling test for GVR analysis.

[8] The Kansas court's tacit reaffirmation of its earlier *Harding* decision distinguishes this case from *Lord's Landing Village Condominium Council Of Unit Owners*, ___ U.S. ___, 117 S. Ct. 1731 (1997), where the new state court decision "explicitly disapproved" of the prior state precedent on which the court of appeals relied. *Id.* at 1733. In addition, the court of appeals' reliance on *Harding* occurred in *KPERS III*, not in *KPERS VI* for which the GVR order is now sought.

required by *KPERS III*, and KPERS' claims would still be barred. It would be a wasteful exercise to remand a case for the court of appeals to apply another state's law than the one that was "changed" in the new decision in order to reach the same result as has already been reached. Thus, under the test of *Lawrence v. Chater*, 116 S. Ct. at 607, this case is not "potentially appropriate" for the GVR procedure.

c. What KPERS is really trying to accomplish with its federalism arguments, and its request for a GVR order, is another round of litigation over its Home Savings investment. This is shown by the obscure comment in the last line of KPERS' last footnote that the "legal consequences of a decision based on the Missouri statute of limitations" might not be the same as the "legal consequences" of the Eighth Circuit's current decision in *KPERS VI*. Petition at 21, n.27. Though purposefully vague, what KPERS is saying is that if it can get this case remanded to the Eighth Circuit, where it knows it will lose again under the Missouri statute of limitations, it will sue again in the Kansas courts and argue that the federal judgment in this case is not binding if it is based on the Missouri statute. This Court's certiorari discretion is not appropriately exercised to aid a disappointed litigant trying to find a new forum perceived to be more hospitable to stale claims.

In the district court summary judgment proceedings, KPERS presented no evidence to create a triable question on whether it knew of the core facts of its claims prior to December 1986. App. 36a-44a. As the case against the Home Savings defendants was not filed until December 23, 1991, App. 8a, KPERS claims are just as barred under

the Missouri five year statute as they are under the Kansas two and three year statutes applied by the courts below. But KPERS wants a GVR order anyway because, as it suggests in its last footnote, Petition at 21, n.27, if the judgment in this case ends up being based on Missouri law, KPERS may argue in a new lawsuit that the "legal consequences" of this judgment do not preclude a new case in the Kansas courts. KPERS can take some comfort in this position from the Kansas Supreme Court's refusal to apply previous established Kansas law collateral estoppel principles against KPERS in its recent decision. *KPERS*, 1997 WL 374595 at *27-29.

Although this latest gambit by KPERS is not precisely the same kind of "manipulative litigation strategy" mentioned in *Lawrence v. Chater*, 116 S. Ct. at 607, it is highly relevant to the "equities of the case." The Court should not let its GVR process be used in this fashion, where the litigant cannot hope to alter the result already reached in the case by the court of appeals. *Cf. D.L. Thomas v. American Home Products, Inc.*, ___ U.S. ___, 117 S. Ct. 282, 283-84 (1996) (Scalia, J., concurring) ("When the conflict is of 'far more dubious . . . relevance' than the one at issue here, *post*, at 285, we can and should exercise our discretion to deny the petition for writ of certiorari."). There is no equity in favor of a litigant who purposefully ignores its potential investment claims while it waits to see how its returns fare over the long term. At bottom, there are no "potential benefits" to the just and fair outcome of this case from the GVR order sought by KPERS that would outweigh the inevitable costs and delay from further proceedings that are not necessary in order to be sure that the court of appeals reached the proper result. This is

especially true in this case where the court of appeals has reviewed the case seven times.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3262/3317/3680WMKC

Kansas Public Employees Retirement System,	*	
Appellant,	*	Appeal from the United Stats District Court for the Western District of Missouri
vs.	*	
Blackwell, Sanders, Matheny, Weary & Lombardi, etc., et al.,	*	
Appellees.	*	

Appellant's motion for leave to file a second petition for rehearing out of time has been considered by the court and is denied.

September 9, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit